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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

HARVEY F. GARLOTTE,
*Petitioner*

v.

KIRK FORDICE,
*Respondent.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

# BRIEF OF AMICI POST-CONVICTION ASSISTANCE PROJECT OF THE UNIVERSITY OF VIRGINIA AND NATIONAL LEGAL AID AND DEFENDER ASSOCIATION IN SUPPORT OF PETITIONER

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## INTEREST OF AMICI CURIAE

Letters of consent from both parties are on file in the office of the Clerk of the Court.

The Post-Conviction Assistance Project (P-CAP) is a Virginia nonprofit corporation organized and staffed by student volunteers at the University of Virginia School of

Law. Since its establishment in 1971, P-CAP has advocated respect for the rights of those confined to our nation's prisons. P-CAP members answer inquiries and requests for legal assistance from *pro se* litigants, interview arrestees in preparation for bail hearings, and represent prisoners, under third-year practice rules, in federal habeas corpus and civil rights suits.

P-CAP's interest as *amicus curiae* arises from its experience working with inmates and responding to requests for help from *pro se* litigants. In 1991, before the United States Court of Appeals for the Fourth Circuit, P-CAP successfully argued a case factually similar to the present case in Bernard v. Garraghty, 934 F.2d 52, in which the court adopted a definition of "in custody" similar to the one advocated by Mr. Garlotte, but rejected by the Fifth Circuit. The concern of *amicus curiae* is ensure one full and fair opportunity for *pro se* litigants to raise their claims in federal court by promoting a more coherent and uniform application of laws governing habeas corpus litigation.

The National Legal Aid and Defender Association (NLADA) is a private, non-profit national membership organization headquartered in Washington, D.C. which serves as a collective voice for both civil legal services and indigent defense services throughout the nation. For more than eighty years, NLADA has worked to expand and improve the quality of legal services for all persons unable to retain counsel. Each year, NLADA responds to thousands of requests for assistance from prison and jail inmates around the country.

## SUMMARY OF ARGUMENT

I. The court of appeals erred because Mr. Garlotte is "in custody" pursuant to the first conviction for several reasons. First, as this Court held in Peyton v. Rowe, 391 U.S. 54, 64 (1968), custody "comprehends [the habeas petitioners'] status for the entire duration of their imprisonment [under consecutive sentences]." Irrespective of whether a petitioner is challenging a consecutive sentence he has nominally completed or has yet to start, consecutive sentences constitute the functional equivalent of one extended sentence. To the petitioner, it is only a matter of administrative convenience which sentence he serves first, and often the second sentence is served for conduct preceding that giving rise to the first sentence. Additionally, the state treats consecutive sentences as one aggregate sentence for purposes of parole eligibility, Miss. Code Ann. § 47-7-3(1) (Supp. 1994), and commutation of sentences for meritorious earned time credits. Miss. Code Ann. § 47-5-139(2) (Supp. 1994). No substantial state interest turns on which sentence is served first.

Moreover, Mr. Garlotte's first sentence has not fully expired, because he has six months left on that sentence which he must eventually serve either in prison or on parole. The future parole or prison time that Mr. Garlotte must serve attributable to the initial sentence plainly satisfies the custody requirement. Jones v. Cunningham, 371 U.S. 236 (1963). The conclusion of custody is entirely consistent with this Court's decision in Maleng v. Cook, 490 U.S. 488 (1989), because Mr.

Garlotte in this case asserts he is in custody, not because of any collateral consequences, but because of the current and future restraints imposed by Mississippi for that conviction.

II. Finally, even if Mr. Garlotte were not in custody for the first conviction, he is unquestionably in custody for the second set of sentences. As this Court held in Maleng, a petitioner satisfies the custody requirement by challenging a current conviction as enhanced by one that has previously expired. 490 U.S. at 493. Here, the relationship between the prior and current convictions is more palpable: if Mr. Garlotte's first conviction is invalidated, the state will credit his current sentences with the time he served for the first, invalid conviction. See Johnson v. Henderson, 455 F.2d 983 (5th Cir. 1972); See also Blitz v. United States, 153 U.S. 306 (1894). Thus, Mr. Garlotte is not only in custody for the current sentences, but he can challenge the merits of the first sentence because, if successful, the state will credit those sentences with time previously served on the invalidated conviction.

# ARGUMENT

## I.

## PETITIONER IS CURRENTLY IN CUSTODY UNDER THE AGGREGATE OF CONSECUTIVE SENTENCES IMPOSED BY THE TRIAL COURT

The habeas corpus statutes, 28 U.S.C. § 2254 (1988), 28 U.S.C. § 2241(c)(3) (1988), provide for the issuance of writs on behalf of persons "in custody." Although the statute does not define "custody," this Court has construed the term in a flexible manner, concluding for instance that a parolee was in custody by examining the "restraints [on the petitioner] not shared by the public generally." Jones v. Cunningham, 371 U.S. 236, 240 (1963). See also Hensley v. Municipal Court, 411 U.S. 345, 348-52 (1973) (petitioner released after conviction on own recognizance satisfied custody requirement). More generally, this Court has explained that "custody" must be understood by "recourse . . . to the common law. . . and to the decisions of the Court interpreting and applying the common law principles." Peyton v. Rowe, 391 U.S. 54, 59 (1968) (quoting McNally v. Hill, 293 U.S. 131, 136 (1934)).

In elaborating upon that meaning of "custody," this Court has previously determined that prisoners may challenge the second of two consecutive sentences as long as they are incarcerated "under the aggregate of consecutive sentences imposed on them." Peyton, 391 U.S. at 64. In other words, "in common understanding 'custody' comprehends [the habeas petitioners'] status for

the entire duration of their imprisonment [under consecutive sentences]." Id. That reasoning applies as well to the instant case in which Mr. Garlotte seeks to challenge the first of two consecutive sentences even if, by the time he had exhausted his state remedies, the first sentence had nominally expired.[1]

Mr. Garlotte must be considered in custody for the first consecutive sentence for two related reasons. First, from the perspective of both inmates and state officials, consecutive sentences constitute the functional equivalent of one extended sentence, and Mr. Garlotte therefore remains in custody on all consecutive sentences during the aggregate term of imprisonment.

From the vantage point of the offender, it is immaterial which consecutive sentence is nominally served first. Prisoners care about their full term of confinement, and are only interested in curtailing their incarceration when possible. They will likely challenge both consecutive sentences as early as possible during their term of confinement.

With respect to the state's administrative interests, the key determinant is the total term of confinement, and

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[1]This Court held in Peyton that a habeas petitioner could challenge the second of two consecutive sentences even while he or she is technically in custody under the first sentence. This Court noted that both the habeas petitioner and the state might otherwise be prejudiced by the delay, since witnesses and evidence might become harder to locate with the passage of time. Id. at 62-63. Nonetheless, the Court did not hold such evidentiary concerns dispositive, and as we suggest infra at page 13, permitting suit in this context would not foster delay.

not the duration of the individual component sentences. For instance, in Mississippi, parole is determined by the total term of confinement, not by each individual sentence. As is the case with the Virginia law examined in Peyton,[2] Mississippi provides that parole must be ascertained under the terms of the combined sentences:

> Every prisoner who has been or may hereafter be convicted of any offense against the State of Mississippi, and is confined in the execution of a judgment of such conviction in the Mississippi State Penitentiary for a definite term or terms of one (1) year or over . . . who has served not less than one-fourth (1/4) of the total of such term or terms for which such prisoner was sentenced, or, if sentenced to serve a term or terms of thirty (30) years or more, or if sentenced for the term of the natural life of such prisoner, has served not less than ten (10) years of such life sentence, may be released on parole."

Miss. Code Ann. § 47-7-3(1).[3] Mississippi bases parole

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[2]See also Bernard v. Garraghty, 934 F.2d 52 (4th Cir. 1991).

[3]If one of the consecutive sentences precludes parole, however, or permits parole under more restrictive circumstances, then such restrictions must be considered in calculating parole eligibility for the combined sentences. See, e.g., Williams v. Puckett, 624 So. 2d 496 (Miss. 1993). See also Milam v. State, 578 So. 2d 272 (Miss. 1991) (addressing exceptional circumstance when one of the

determinations upon the total of all consecutive sentences. Parole eligibility under Section 47-7-3 would often be different if each crime were treated separately. For instance, assume two consecutive sentences of sixteen years each. If computed separately, an inmate would be eligible for parole after serving four years in prison on each, or eight years if taken together. But under the statute, parole eligibility would not exist until the prisoner had served ten years. See also Miss. Code Ann. § 47-7-3(1)(c) ("No one shall be eligible for parole until he shall have served . . . ten (10) months of his sentence or sentences when his sentence or sentences is more than two (2) years but no more than five (5) years") (emphasis added). As in Peyton, therefore, "[p]ractially speaking, [the petitioner] is in custody for 50 years, or for the aggregate of his 30 and 20-year sentences. For purposes of parole eligibility . . . he is incarcerated for 50 years." Peyton, 391 U.S. at 64.

Similarly, Mississippi treats consecutive sentences as one total term for commutation of the sentences for meritorious earned-time credit. Section 47-5-139(2) of the Mississippi Code provides that "[a]n offender under two (2) or more consecutive sentences shall be allowed commutation [for earned time] based upon the total term of the sentences."

Thus, no sound penological justification dictates which consecutive sentence an offender nominally serves first. Chronologically, the second of two consecutive

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component sentences limits amount of good time credit attainable). But the order in which the sentences are served remains of no consequence.

sentences may be imposed for convictions that preceded convictions underlying the first sentence, and the acts giving rise to the second conviction may have occurred before those giving rise to the first.[4] Of course, the state may prefer to designate the shorter of the two consecutive sentences first to forestall collateral review, but that cannot be considered penologically legitimate. Thus, because consecutive sentences are functionally equivalent to one total sentence from the perspective of both the inmate and the state, an inmate is in custody for all consecutive sentences during the entire term of confinement. Permitting suit would minimize the role of caprice in the habeas system.

Second, Mr. Garlotte is in custody because Mississippi has yet to discharge him fully from the marijuana conviction. Part of the parole Mr. Garlotte may serve at the end of the consecutive sentences is attributable to the first sentence. The possibility of parole demonstrates continuing state constraint relating to the first sentence. This Court has held that inmates are in custody not only when they are behind prison walls, but also when they are on parole. Jones v. Cunningham, 371 U.S. 236 (1963). Prisoners on parole must typically obey special rules imposing reporting requirements, limiting the parolees' geographic mobility, circumscribing whom they can associate with, and requiring periodic drug tests. Indeed, any transgression may result in a return to the

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[4]In Bernard v. Garraghty, 934 F.2d 52 (4th Cir. 1991), for instance, the second conviction arose from conduct occurring before that underlying the first conviction.

prison itself. Such constraints plainly suffice to constitute custody.

In this case, Mr. Garlotte started serving his first sentence on May 31, 1985. (Petition for Certiorari at Appendix V). His discharge date for the first sentence was one year later, on June 1, 1986. Id. The Mississippi Department of Corrections provides that, hypothetically for the first conviction alone, Mr. Garlotte's parole eligibility date would have been December 2, 1985. Id. Because Mississippi law requires a mandatory minimum of ten years incarceration for a natural life term, Miss. Code Ann. § 47-7-3(1), the Department of Corrections added ten years to Mr. Garlotte's parole eligibility date of December 2, 1985, and provided the current date of December 2, 1995. (See Petition for Certiorari at Appendix V).

According to the Department of Corrections, Mr. Garlotte's murder convictions began on December 2, 1985. Id. As of December 2, 1995, his first parole eligibility date, Mr. Garlotte will have served six months on his one-year marijuana conviction, and ten years on his concurrent sentences for murder. Mr. Garlotte thus still has six months to serve either on parole or in prison which is directly attributable to his first sentence.[5] Whether served on parole or in prison, that six-month period satisfies the custody requirement under the habeas statutes. As in Peyton, Mr. Garlotte must be allowed to challenge a conviction for which he will be in custody under consecutive sentences.

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[5]Cf. Armstrong v. State, 618 So. 2d 88 (Miss. 1993) (offender released on parole on same day for two consecutive sentences).

Moreover, continuing custody can be demonstrated by considering what Mississippi would do if an inmate's second sentence were invalidated immediately after the first of consecutive sentences nominally expired. We doubt that Mississippi would release an inmate in that situation;[6] rather, Mississippi would presumably release the inmate on parole for the first sentence, and any violation of parole would force his return to custody. Thus, because Mr. Garlotte has yet to serve parole attributable to his first conviction, he must still be considered in custody for that conviction.

Although the court below noted that Mr. Garlotte's parole has been "delayed" by the first conviction, 29 F.3d at 218, it failed to recognize that the parole itself will be attributable to both sentences. Cf. Peyton, 391 U.S. at 64. The court therefore concluded, in reliance on this Court's decision in Maleng v. Cook, 490 U.S. 488 (1989), that delayed parole is a mere collateral consequence of the first conviction and insufficient to satisfy the custody requirement. But once it becomes clear that the parole is attributable to the first sentence, then Maleng is no longer controlling, and the court's conclusion flatly contradicts this Court's holding in Jones v. Cunningham that a prisoner on parole is in custody.

In Maleng, this Court held that a habeas petitioner could not challenge a sentence in one jurisdiction that had already expired when he was in custody in a different jurisdiction on unrelated charges. The only collateral effect remaining was the possibility of enhanced

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[6]Mississippi, however, would credit the first sentence for time served on the second.

subsequent punishments due to operation of recidivist statutes. This Court explained that "collateral consequences . . . are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack upon it." 490 U.S. at 492. Exclusive reliance on collateral consequences to establish jurisdiction "stretche[d] the language 'in custody' too far." Id. at 491. However, the question before the Court in this case is not one of collateral consequences, but rather whether Mr. Garlotte is still in custody on the marijuana conviction because he remains incarcerated under the aggregate sentences, and may yet earn parole directly attributable to the marijuana conviction. The Maleng decision never addressed the unique status of consecutive sentences, never disputed that a prisoner on parole is in custody, and never signalled a retreat from either Peyton or Jones v. Cunningham.

Moreover, other courts of appeals have construed Maleng to comport with this Court's decisions in Peyton and Jones v. Cunningham. In Bernard v. Garraghty, 934 F.2d 52 (4th Cir. 1991), and in Fawcett v. Bablitch, 962 F.2d 617, 618 (7th Cir. 1992), the courts of appeals held that a prisoner serving consecutive sentences is "in custody" under any one of the two sentences for purposes of the habeas statutes. And in Fox v. Kelso, 911 F.2d 563, 568 (11th Cir. 1990), the court of appeals concluded that Maleng did not apply where the offender would receive credit against his current sentence if he successfully challenged the first consecutive sentence that had already technically expired.

Finally, permitting suit would in no way clog the federal courts. Prisoners serving consecutive sentences

have every incentive to file petitions at the earliest practicable moment. Indeed, in this case, Mr. Garlotte filed a habeas petition in state court, but due to the delay inherent in the process, was not able to file a petition in federal court before his conviction for the marijuana charge nominally expired.[7] There is no reason to suspect delay or any strategic manipulation on the part of prisoners, and if manipulation is attempted, this Court (or lower courts) can easily redress such instances of abuse as they arise. See Rule 9(a) Governing Section 2254 Cases in the United States District Courts. Thus, it will be the rare case in which a prisoner challenges the first of two consecutive sentences after the first sentence has nominally run its course.

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[7]The court of appeals' rule would in fact pressure offenders serving consecutive sentences into filing premature federal petitions for fear of losing the federal forum. This Court has repeatedly stressed, however, that inmates should not abuse the writ but rather should "exercise [] reasonable care and diligence" to marshal all conceivable arguments in one coherent effort. McCleskey v. Zant, 499 U.S. 467 (1991). Recognizing that inmates remain in custody throughout both legs of consecutive sentences furthers this Court's interest in encouraging prisoners to file only considered, plausible petitions.

II.

## EVEN IF PETITIONER IS NOT IN CUSTODY FOR THE FIRST SENTENCE, HE IS IN CUSTODY FOR THE SECOND SET OF CONSECUTIVE SENTENCES AND CAN CHALLENGE THE VALIDITY OF THE FIRST SENTENCE BECAUSE HE WILL RECEIVE CREDIT ON THE SECOND SENTENCES IF THE FIRST IS INVALIDATED

In Maleng, this Court construed the offender's challenge to an expired sentence as a challenge to a subsequent sentence, for which he was in custody, as enhanced by the prior conviction. Although the Court decided the jurisdictional issue in petitioner's favor, it left open the question whether the lower courts on remand should reach the merits of petitioner's challenge to the expired conviction: "We express no view on the extent to which the [expired] conviction itself may be subject to challenge in the attack upon the 1978 sentences it was used to enhance." 490 U.S. at 494.

In this case as well, the Court should read the petition as challenging the murder convictions because, if the marijuana conviction is overturned, Mr. Garlotte would be credited with the amount of time already served on the marijuana conviction.[8] Whether the duration of a sentence is enhanced or extended because of a prior conviction is immaterial for purposes of the custody determination. The court of appeals inexplicably declined to follow this Court's path in Maleng, refusing to construe

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[8]See infra page 16.

the petition to challenge the second set of consecutive sentences. Thus, Mr. Garlotte satisfies the jurisdictional custody requirements of 28 U.S.C. §§ 2241 and 2254.[9]

As in Maleng, this Court need not resolve the extent to which Mr. Garlotte may challenge the merits of the marijuana conviction on the ground that, but for the conviction, he would be released earlier from prison on the sentences imposed consecutively to that conviction. Numerous lower courts, however, in applying Maleng have reached the merits of such challenges in analogous contexts. For instance, the courts of appeals in Gamble v. Parsons, 898 F.2d 117 (10th Cir. 1990), cert. denied, 498 U.S. 879 (1990); Clark v. Pennsylvania, 892 F.2d 1142 (3d Cir. 1989); Feldman v. Perrill, 902 F.2d 1445 (9th Cir. 1990); and Crank v. Duckworth, 905 F.2d 1090 (7th Cir. 1990), cert. denied, 498 U.S. 1040 (1991), addressed the merits of challenges to prior convictions by reformulating the petitions to attack subsequent sentences as enhanced by the original convictions. Indeed, the Fifth Circuit has followed suit. Willis v. Collins, 989 F.2d 187 (5th Cir. 1993).

To resolve the instant case, this Court need not travel that route. The challenge in this case turns not on enhancement of a current sentence, but rather on receiving automatic credit for time previously served. In the context of consecutive sentences, as in the context of a second sentence for the same acts after an initial

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[9]On remand, Mr. Garlotte should be afforded the opportunity to press his challenge to the murder convictions together with any other claims for which he has exhausted his state remedies. Cf. Rose v. Lundy, 455 U.S. 509 (1982).

conviction has been overturned,[10] the offender receives credit for time served on the first sentence if it is invalidated. See, e.g., Goodwin v. Page, 418 F.2d 867, 868 (10th Cir. 1969); Johnson v. Henderson, 455 F.2d 983, 984 (5th Cir. 1972); Jackson v. Jones, 327 S.E.2d 206, 254 Ga. 127 (1985). Indeed, the court below implicitly so held in this case, finding that, if the first conviction were overturned, Mr. Garlotte would be eligible for parole earlier. 29 F.3d at 218. In light of that nexus between consecutive sentences, the court of appeals in Fox v. Kelso, 911 F.2d 563 (11th Cir. 1990), held that federal courts should review the merits of a challenge to the first of consecutive sentences even when it has expired, as long as the petitioner would receive credit on his current sentence if the prior sentence were invalidated. Thus, in this case as well, because of the symbiotic relationship between consecutive sentences, Mr. Garlotte should be able to challenge the merits of the first consecutive sentence as long as the duration of the second set of consecutive sentences hinges directly on the validity of the first.

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[10]See, e.g., Blitz v. United States, 153 U.S. 308 (1894) (ordering that offender must receive credit for time already served on related charge that was invalidated); United States v. Baez, 732 F.2d 780 (10th Cir. 1984) (same, construing 18 U.S.C. § 3568 (repealed 1984) (current version at 18 U.S.C. § 3585 (1988))).

## CONCLUSION

For the foregoing reasons, we respectfully request the Court to reverse the court's decision below and hold that Mr. Garlotte is in custody for purposes of challenging the first consecutive sentence.

Respectfully submitted,

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